had innocently failed fully to perform that which the parties had stipulated as an express condition precedent. Where the plaintiff has acted in good faith,[21] where the purpose of the contract is not frustrated by the variance,[22] where a forfeiture not within the evident contemplation of the parties would result under a different construction,[23] the courts should, in order to do equity, allow recovery on the contract despite an immaterial breach of an expressly or impliedly conditional promise.[24]

USURY AND THE CONFLICT OF LAWS.—When a bond or note or other interest-bearing contract made in one jurisdiction and to be performed in another is usurious in one and valid in the other, have we any general rules by which to determine the law which should be applied? This question was raised squarely in the recent case of *Bowman* v. *Price* (Tenn. 1920) 226 S.W. 210 and was, it would seem, properly disposed of by the court. The plaintiff sued on four notes calling for 8% interest, executed and delivered in Alabama where such rate was legal. The payee was a West Virginian and the maker a resident of Tennessee where, for the maker's convenience, the notes were payable. In both West Virginia and Tennessee 8% was usurious. No evidence of bad faith appearing, the court applied Alabama *law* and found for the plaintiff.[1] The court properly stated that the fundamental principle in these cases is that effect must be given to the presumed intention of the parties.[2] Of course, the court realized that in most of these cases

[21] See *Easthampton etc. Co.* v. *Worthington* (1906) 186 N. Y. 407, 412, 79 N. E. 323.

[22] See *Hoglund* v. *Sortedahl* (1907) 101 Minn. 359, 361, 112 N. W. 408.

[23] Where the language of the contract indicates that the parties did contemplate the contingency, the plaintiff might with more justice be held to a strict performance. But where, as in the instant case, the contingency seems clearly without the contemplation of the parties, a substantial performance should be a sufficient basis for recovery in contract.

[24] *Foeller* v. *Heintz* (1908) 137 Wis. 169, 118 N. W. 543; *cf. Wiley* v. *Inhabitants of Athol* (1890) 150 Mass. 426, 23 N. E. 311; *Bowen* v. *Kimball* (1909) 203 Mass. 364, 89 N. E. 542. The application of this doctrine is not limited to building contracts. *Carter* v. *Scargill* (1875) L. R. 10 Q. B. 564 (sale of business); see *City of LaFollette* v. *LaFollette etc. Co.* (C .C. A. 1918) 252 Fed. 762, 768 (contract to supply water); *Sult* v. *Warren School Township* (1894) 8 Ind. App. 655, 659, 36 N. E. 291 (subscription contract); *M'Auley* v. *Billenger* (N. Y. 1822) 20 Johns. *89, *90 (subscription contract). In *Carter* v. *Scargill, supra,* the court said, "The defendant having received a substantial proportion of the consideration, it is no longer competent to him to rely upon the non-performance of that which might have been originally a condition precedent . . ."

[1] The writer has seen fit to italicize the word "law," because of the customary looseness with which that term is applied in these cases. Most usury statutes do not expressly profess to deal with contracts not entirely consummated within the borders of the state. Only by judicial interpretation is it possible to extend these statutes to cases involving extra-territorial elements. When a New York court, for instance, professes to apply Alabama "law," what it is really doing is to adopt the Alabama statute as New York law. This can best be illustrated by the fact that it is a not uncommon phenomenon of conflict of laws, that the Alabama court in the exact case before the New York court would have decided otherwise than the New York court. How fatuous then, for the New York court to declare that it is applying Alabama "law."

[2] This rule of presumed or nominal intention, though much favored by English courts in all cases of contract, has been applied in America to but few groups of cases. Such a rule is chaotic from the lawyer's viewpoint. Prediction of judicial decision becomes almost an impossibility when presumed intentions govern. The court has a wide opportunity to decide *a priori* whether it wishes to uphold or invalidate a transaction; if the former, it may easily declare that the parties presumably intended that law to govern which validates the agreement. If the latter, a contrary intention may be presumed.

the parties have no intentions, one way or the other, as to the law to be applied to their transaction. But they may be presumed, so runs the argument, to intend such law to control as will validate their contract. Presumably, it is said, parties are not making empty gestures when they profess to be making contracts. But, urged the court, quoting from 39 Cyc. 892, "this rule that the intent of the parties designates the governing law is subject to these provisos: (1) the intent must be entertained in good faith, and not for the purpose of evading the usury laws of another state; (2) it must be reasonable, and referable to a place where some important element of the contract has its situs; (3) it must not be contrary to the public policy of the forum."[3] It is to these exceptions to the rule of presumed intent that we propose to direct our attention.

What is meant by "reasonable and referable?" In most of the cases, the courts apply either the *lex loci contractus* or the *lex loci solutionis*. In the absence of express stipulation, it is usually presumed that the parties intend their contract to be solvable either by the laws of the jurisdiction in which the contract was made or by those of the jurisdiction in which it was to be performed.[4] Thus, if the interest called for is usurious by the law of both these jurisdictions, the contract is almost invariably declared void.[5] Similarly, it is void if the place of contracting and the place of performance are the same jurisdiction and by its laws the contract is usurious.[6] If the rate stipulated is usurious in both these jurisdictions and a different penalty is imposed by the law of each, the courts usually apply that imposed by the *lex loci contractus* as that governing in general the validity and effect of a contract.[7] In such cases, the intent of the parties should be disregarded, since they are law-breakers in either jurisdiction.[8] Where, in these cases, the parties expressly provide that their contract is to be governed by the laws of some third jurisdiction in which the interest is legal, we get a question in which is involved a consideration of the doctrine of good faith, which is presently to be examined. However, a contract will ordinarily be enforced, if it be valid at either the place of contracting[9]

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[3] It is difficult to discern what is meant by this third proviso. It cannot well mean that a contract is to be considered as void whenever the parties intend a rate of interest usurious by the *lex fori*. Were this so, the rule in these cases would be much simplified. The *lex fori* would govern in perhaps a majority of the cases. But the cases themselves show that this is not the law. Mere offense to the usury laws of the forum has never been declared fatal. *Steinman* v. *The Midland etc. Loan Co.* (1908) 78 Kan. 479, 96 Pac. 860; *Stickney* v. *Jordan* (1870) 58 Me. 106.

[4] It is to be noted in these cases involving bonds and notes that the place of contracting is the jurisdiction in which the instrument was delivered and not where it was executed. This is but a further illustration of the well-settled American rule of conflict of laws that the place of contracting is the place where the last act is done which makes the contract binding. *Staples* v. *Nott* (1891) 128 N. Y. 403, 28 N. E. 515; *Midland etc. Loan Co.* v. *Solomon* (1905) 71 Kan. 185, 79 Pac. 1077; *U. S. Savings & Loan Co.* v. *Beckley* (1902) 137 Ala. 119, 33 So. 934.

[5] See *Arnold* v. *Potter* (1867) 22 Iowa 194, 198.

[6] *Hubble* v. *Morristown Land etc. Co.* (1895) 95 Tenn. 585, 32 S. W. 965; *McGarry* v. *Nicklin* (1895) 110 Ala. 559; *cf. Midland etc. Loan Co.* v. *Solomon, supra,* footnote 4.

[7] *Bascom* v. *Zediker* (1896) 48 Neb. 380, 67 N. W. 148; see *Davis etc.* v. *Tandy* (1904) 107 Mo. App. 437, 449, 81 S. W. 457.

[8] Some early New York cases applied a different rule. They applied the rule of the jurisdiction which imposed the lesser penalty upon the parties. Thus, in *Opdyke* v. *Merwin* (N. Y. 1878) 13 Hun 401, the Connecticut rule was applied to a bill of exchange made in Connecticut and payable in New York. Both jurisdictions considered the stipulated rate usurious, but Connecticut provided merely for a forfeiture of interest. The contract was treated as valid in Connecticut with a penalty attached and wholly void in New York. Effect was therefore given to the presumed intention of the parties.

[9] *Davis etc.* v. *Tandy, supra,* footnote 7; *Whitlock* v. *Cohn* (1904) 72 Ark. 83, 80 S. W. 141; *Staples* v. *Nott, supra,* footnote 4.

or the place of performance.[10] This proposition has been declared to be "too well-settled to require discussion."[11] The only proviso is good faith. It must not be imagined, however, that the courts consider only the *lex loci contractus* or the *lex loci solutionis* as reasonable and referable. In the absence of an intention to evade usury laws, for instance, some courts have permitted contracts to be governed by the law of the jurisdiction in which the collateral is situated, especially if one of the parties is a resident of that jurisdiction.[12]

This question of what is reasonable and referable is so closely bound up with that of good faith that a further discussion thereof, without an examination of the cases which throw light on what constitutes good faith, would be fruitless. At the outset, it must be noted that the mere express stipulation that the law of a certain jurisdiction is to govern the transaction, is not to be taken as evidence of bad faith[13] nor, as we have seen, will the courts regard as bad faith per se a stipulation that the law of some other jurisdiction shall govern than that of the place of contracting or the place of performance.[14] What the courts seem to balk at, what they stamp as bad faith, is an attempt to evade the usury laws of the jurisdiction in which the contract is made. It remains for us to determine under what circumstances the courts are most likely to find this purpose to evade the law.

One who gives these cases only a superficial examination must notice that a considerable proportion of them arise because of transactions involving building and loan associations. As a general rule we find these associations incorporated in one state and doing business in another state in which so high a rate of interest is not permitted. They make loans secured by mortgages of land in the borrower's state and stipulate for a rate of interest legal in the state of their incorporation, but illegal in the state in which the loan is made. Were the general rules thus far discussed to be applied, the transactions would be valid, especially in such cases as provide for repayment of the loan in the state in which the association was incorporated. But most courts strain the general rule in these cases. They more readily imply a purpose to evade the usury laws of the state in which the borrower lives.[15] This policy prevents such associations from incorporating in states which allow the highest rates of interest and forcing such rates upon states with more rigid usury statutes.[16] If, in these cases, it is found that the *locus* of the association's incorporation has been denominated as the place of performance merely as a subterfuge, and that the performance, to wit the repayment, was actually to take place in the state in which the loan was made, almost all courts would agree that the contract should be governed by the *lex loci contractus* and should be declared

[10] *Ames* v. *Benjamin* (1898) 74 Minn. 335, 77 N. W. 230; *Bigelow* v. *Burnham* (1891) 83 Iowa 120, 49 N. W. 104; *Scott* v. *Perlee* (1883) 39 Ohio 63; *contra, Kilcrease* v. *Johnson* (1890) 85 Ga. 600, 11 S. E. 870; *Hooley* v. *Talcott* (1908) 129 App. Div. 233, 113 N. Y. Supp. 820. These two cases are clearly contrary to the great weight of authority. xamination of the New York case seems to show that the court applied the general contract rule of the *lex loci contractus* and failed to note that a different rule prevails in these cases.

[11] See *Bldg. & Loan Assn.* v. *Griffin* (1897) 90 Tex. 480, 488, 39 S. W. 656.

[12] *Lanier* v. *Union Mtge. etc. Co.* (1897) 64 Ark. 39, 40 S. W. 466; *Arnold* v. *Potter, supra,* footnote 5; *Glover* v. *Equitable Mtge. Co.* (C. C. A. 1898) 87 Fed. 518, (*semble*).

[13] *U. S. Savings & Loan Co.* v. *Beckley, supra,* footnote 4; *Lanier* v. *Union Mtge. etc. Co., supra,* footnote 12.

[14] *Supra,* footnote 12 .

[15] *Shannon* v. *Georgia State Bldg. etc. Assn.* (1901) 78 Miss. 955, 30 So. 51; *Building etc. Assn.* v. *Griffin, supra,* footnote 11; *Meroney* v. *Atlantic Bldg. etc. Assn.* (1895) 116 N. C. 882, 21 S. E. 924.

[16] Some courts, however, have not adopted so stringent a policy towards building and loan associations. The Kansas court has even gone so far as to state that "the position assumed by some courts in reference to this matter, when considering building and loan association cases, can scarcely be regarded as anything less than the

void.[17] In such a case, the *lex loci contractus* and *lex loci solutionis* are in reality the same.

Another instance in which "the parties will be presumed to have intended a fraudulent evasion"[18] of the laws, is one in which an obligation is "made payable at a place other than the residence of either of the parties and foreign to the subject matter of the contract, and a higher rate of interest is stipulated for than the laws of the place of contract permit."[19] As a result, if we had a case in which A loaned money to B in state X, which permitted only 6% interest, the transaction would be void if it called for 8% interest, even though 8% was permitted in state Y and it was expressly stipulated that the transaction should be governed by the law of state Y. If, however, either party resided in state Y, or some other fact was evident which negatived the idea that state Y was made the *lex loci solutionis* merely as a subterfuge, probably the transaction would be upheld as coming within the general principle underlying all of these cases.[20]

Again, where the place of contracting is merely nominal and selected for purposes of evasion, the transaction will be invalidated.[21] Thus, if A and B make a note in state X and provide for a usurious rate, the note will not be enforced, even though the parties go to state Y where the stipulated rate is legal, in order to exchange the papers.[22]

What, then, is the result of the cases? What is the test for good faith? To answer these questions we must revert to our general principles. What jurisdiction did the parties intend should govern? This intention will be respected, unless an additional intention exists—an intention to evade the usury laws. And this latter question of intention, like most questions of fact, is for the jury.[23] But certain well-recognized considerations influence the courts in their instructions to the jury. Thus, it is difficult to impute an intention to evade the law to one who is ignorant of the law. Similarly, it is a simple matter to find a legitimate intent when the transaction is valid at a place with which a major portion of the transaction may be associated. And that is all that is meant by the "reasonable and referable" rule out-

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result of a *tour de force*." See *Midland etc. Loan Co.* v. *Solomon, supra,* footnote 4, 191.

[17] *Shannon* v. *Georgia State Bldg. etc. Assn., supra,* footnote 15; *Building etc. Assn.* v. *Griffin, supra,* footnote 11. The writer was able to find one case, which, if logically applied, might differ with this result. See *Smith* v. *Muncie Nat. Bank* (1867) 29 Ind. 158. That case was a suit on a note made in Indiana and payable in Ohio. The note was usurious in Indiana and valid in Ohio. The court declared that the note was valid, *even though the parties actually intended to evade Indiana usury laws.* Said the court, at page 160, "We do not see why the laws of a sister state may not be taken advantage of by citizens of our own state, when, with whatever motive, they elect to make that place the place for the performance of the contract into which they enter."

[18] See Tyler, *Usury* (1873) 83.

[19] See Tyler, *op. cit.* 83, quoted with approval in *Building etc. Assn.* v. *Griffin, supra,* footnote 11, 489; *Arnold* v. *Potter, supra,* footnote 5, 200; *cf. Pacific Bldg. Co.* v. *Hill* (1901) 40 Ore. 280, 67 Pac. 103.

[20] Thus a citizen of state X may come to state Y and borrow money at a rate usurious in state Y, but valid in his own state and the deal will be valid, if no intention is found to evade the usury laws of state Y. *Scott* v. *Perlee, supra,* footnote 10.

[21] See *Cotheal* v. *Blydenburgh* (1845) 5 N. J. Eq. 17, 18.

[22] It is to be noted that no distinction is to be made in these cases of nominal places of contracting or places of performance between those in which it is expressly stipulated that the law of such nominal jurisdiction is to govern, and those in which such intention must be implied from the mere stipulation for a rate of interest which is valid only in that jurisdiction. In both cases the transaction is void, for in both we find the intent to evade usury laws.

[23] *Kilcrease* v. *Johnson, supra,* footnote 11; see *Andrews* v. *Pond* (U. S. 1839) 13 Pet. 65, 76.

lined above.[24] If, on the other hand, the parties are familiar with the law and expressly stipulate that the law most favorable to them shall be applied, the courts are apt to scrutinize the transaction more closely.[25] Thus a penalty is attached to a knowledge of the law. Again, if it appears that a major element of the contract is only nominally at its supposed location and that this would result in an evasion of the usury laws of the place of the real *situs* of the contract, an intent to evade will almost inevitably be found. And finally, we have the case of building and loan associations, where the peculiar policy of many courts has caused a subversion of the general principles applicable to these usury cases.

VIOLATION OF THE SURRENDER CLAUSE IN BILLS OF LADING.—What seems to be a new principle in interpreting the surrender clause in a bill of lading has recently been enunciated by the Supreme Court of the United States in the case of *Pere Marquette Ry.* v. *J. F. French and Co.*[1] The plaintiff had shipped goods over the defendant railway, taking a bill of lading to its own order, containing the usual stipulation that the surrender of the bill of lading should be required before delivery of the goods. The bill was then endorsed in blank and sold to a bank with a draft attached. The bank's agent tortiously delivered the bill, without requiring payment of the draft, to an agent of Marshall and Kelsey, the firm for which the goods were sent. This agent, without even showing the bill of lading, prevailed upon the defendant carrier to deliver the goods, and have them shipped over another road to Marshall and Kelsey, who, however, refused to keep the goods or pay the draft. The bill of lading was sent back to the bank, which returned it to the plaintiff upon payment of the amount advanced on the draft. Plaintiff, having sold the goods for less than the contract price, now sues in trover, on the theory that the carrier, by delivering without surrender of the bill of lading, converted the goods. The conclusion of the Supreme Court was that, although the carrier would be liable where the shipper had suffered any loss through its act, here the loss was caused, not by the act of the carrier at all, but by that of the bank, and hence the defendant was not liable.

This is apparently the first federal adjudication on the exact question involved, at least since the Uniform Bills of Lading Act became effective. The history of the surrender clause, in general, has been a checkered one. Under the earlier cases, it was generally held that a carrier who delivered goods without production of the bill of lading was liable in trover to a *bona fide* purchaser of the bill, before such delivery,[2] and in some jurisdictions even after such delivery.[3] For this reason, when the surrender clause first appeared in bills of lading, it was interpreted by most courts as being inserted only for the protection of the carrier, and the

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[24] Thus, in an excellent and complete note on this subject in 62 L. R. A. 33, it is said, "It will be observed that the qualification as to good faith restricts the operation of the general principle and narrows the choice of laws to those prevailing at the places which are the *situs* of one or more of the important elements or significant circumstances of the transaction."

[25] It must not be forgotten that the mere express stipulation will not of itself constitute bad faith. See footnote 14, *supra*.

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[1] (1921) 41 Sup. Ct. 195.

[2] *McEwen* v. *Jeffersonville, etc. R.R.* (1870) 33 Ind. 368; *The Thames* (C. C. 1870) 7 Blatchf. 226; *First Natl. Bank of Peoria* v. *Northern R.R.* (1877) 58 N. H. 203. See *Natl. Commercial Bank of Albany* v. *Lackawanna Transp. Co.* (1901) 59 App. Div. 270, 69 N. Y. Supp. 396, *aff'd.* (1902) 172 N. Y. 596, 64 N. E. 1123; *Anchor Mill Co.* v. *Burlington, etc. Ry.* (1897) 102 Iowa 262, 71 N. W. 255; *Schlesinger* v. *West Shore R.R.* (1900) 88 Ill. App. 273.

[3] *Walters* v. *Western & A. R. Co.* (C. C. 1893) 56 Fed. 369; *Ratzer* v. *Burlington, etc. Ry.* (1896) 64 Minn. 245, 66 N. W. 988 See *Merchants Natl. Bank* v. *Baltimore, etc. Steamboat Co.* (1906) 102 Md. 573, 63 Atl. 108.